03

(3)

No. 08-53

FILED
AUG 13 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

HOLLY STAUNCH,

Petitioner,

v.

CONTINENTAL AIRLINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT M. WOLFF
Counsel of Record
JANETTE M. LOUARD
LISA A. COTTLE
LITTLER MENDELSON
1100 Superior Avenue, 20th Floor
Cleveland, Ohio 44114
Phone: (216) 696-7600
Facsimile: (216) 696-2038
rwolff@littler.com
jlouard@littler.com
lcottle@littler.com

August 13, 2008

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Did the Sixth Circuit Court of Appeals correctly apply 29 C.F.R. §821.110(c) in determining based upon the detailed record before it that Respondent Continental Airlines sustained its burden of proof to establish that Petitioner Staunch was not an eligible employee under the Family and Medical Leave Act; and that the Petitioner's vague and generalized, self-serving affidavit was insufficient to rebut Respondent's specific evidence or to create a genuine issue of material fact under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Continental Airlines, Inc. ("Continental") has no parent corporation. As a consolidated group, the following publicly-held companies own 10% or more of the stock of Continental: AXA Assurances I.A.R.D. Mutuelle; AXA Assurances Vie Mutuelle; AXA Courtage Assurance Mutuelle; AXA; and AXA Financial, Inc. No other publicly held corporation owns 10% or more of Continental's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
REGULATIONS AND RULES INVOLVED	vi
COUNTERSTATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	3
REASONS WHY THE PETITION SHOULD BE DENIED	9
I. This Case Does Not Warrant Review Under the Standards of Supreme Court Rule 10(c)	9
II. Staunch Waived Her Arguments by Not Presenting Them to the Sixth Circuit Panel	10
III. The Decision of the Court of Appeals Does Not Conflict with Any Decision of This Court or Any Other Circuit Court	12
CONCLUSION	22
APPENDIX A – Regulations and Rules	App. 1
APPENDIX B – Mary Sturchio affidavit	App. 7
APPENDIX C – Excerpts from Defendant Continental Airlines, Inc.'s Amended Memorandum in Support of its Motion for Summary Judgment	App. 12

TABLE OF CONTENTS – Continued

Page

APPENDIX D – Excerpts from Final Brief of the Appellant in the Sixth Circuit Court of Appeals ..... App. 17

APPENDIX E – Excerpts from Final Reply Brief of the Appellant in the Sixth Circuit Court of Appeals ..... App. 30

APPENDIX F – Docket Sheet from Sixth Circuit Court of Appeals ..... App. 38

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 17, 20, 21

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946) 16, 17, 19

Armour & Co. v. Wantock, 323 U.S. 126 (1944) 20

Brungart v. BellSouth Telecomms, Inc., 231 F.3d 791 (11th Cir. 2000) 18

Cantrell v. Delta Airlines, Inc., 2 F. Supp. 2d 1460 (N.D.Ga.1998) 16

Cutter v. Wilkinson, 544 U.S. 709 (2005) 11

Dormeyer v. Comerica Bank-Illinois, 223 F.3d 579 (7th Cir. 2000) 18

Evanoff v. Minneapolis Public Schools, 11 Fed. Appx. 670 (unpublished) (8th Cir. 2001) 18

Humenny v. Genex Corp., Inc., 390 F.3d 901 (6th Cir. 2004) 12

Knapp v. America West Airlines, 207 Fed. Appx. 896, 12 Wage and Hour Cas. 2d 6 (10th Cir. 2006) 8, 15, 18

Kosakow v. New Rochelle Radiology Associates, 274 F.3d 706 (2nd Cir. 2001) 15, 16

Kosakow v. New Rochelle Radiology Associates, 88 F. Supp. 2d 199 (S.D.N.Y.2000) 16

Myers v. The Copper Cellar Corp., 192 F.3d 546 (6th Cir. 1999) 18

TABLE OF AUTHORITIES – Continued

Page

Rich v. Delta Airlines, Inc., 921 F. Supp. 767 (N.D. Ga. 1996) 16

Robinson-Scott v. Delta Airlines, Inc., 4 F. Supp. 2d 1183 (N.D.Ga.1998) 16

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 20

Staunch v. Continental Airlines, 2007 WL 218729 (N.D. Ohio), 12 Wage & Hour Cas. 2d (BNA) 1, 2, 12

Staunch v. Continental Airlines, 511 F.3d 625 (6th Cir. 2008) 2, 10, 14, 15

U.S. v. Johnston, 268 U.S. 220 (1925) 9

Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) 21

Woodford v. Community Action of Greene County, 268 F.3d 51 (2nd Cir. 2001) 18

Youakim v. Miller, 425 U.S. 231 (1976) 11

REGULATIONS AND RULES INVOLVED

29 C.F.R. §825.110(a)(2) 18

29 C.F.R. §825.110(c) ..... *passim*

29 C.F.R. §825.110(d) 10, 18

29 C.F.R. §825.500(f)(1) 10, 18

Supreme Court Rule 10(c) 9

Federal Rule of Appellate Procedure 35(e) 2

TABLE OF AUTHORITIES – Continued

Page

Federal Rule of Civil Procedure 30(b)(6) 21

These regulations and rules are printed in Respondent's Appendix .....App. 1-6

TREATISE

Supreme Court Practice, pp. 464-65, 489 (Eugene Gressman, et al., editors, BNA Books, 9th Ed. 2007) 11, 21

COUNTERSTATEMENT OF THE CASE

On April 25, 2006, Petitioner Holly Staunch ("Staunch") initiated this lawsuit against Respondent Continental Airlines, Inc. ("Continental") claiming that: (1) Continental interfered with her right to take time off under the Family and Medical Leave Act ("FMLA"); (2) Continental terminated Staunch in retaliation for Petitioner's pregnancy-related leave two years earlier; (3) Continental discriminated against Staunch on the basis of her pregnancy; and (4) Staunch's termination was in contravention of Ohio's public policy against pregnancy discrimination. (*R.1, Complaint, Jt. Appx. pp. 8-13*).[1]

On December 18, 2006, the parties filed cross-motions for summary judgment. (*R.34, Continental's Motion for Summary Judgment, Jt. Appx. pp. 182-83*; *R.43, Continental's Amended Memorandum in Support of its Motion, Jt. Appx. pp. 613-44*; *R.39, Staunch's Motion for Summary Judgment, Jt. Appx. pp. 489-90*). On January 26, 2007, the Northern District of Ohio denied Staunch's motion for summary judgment and granted Continental's motion for summary judgment on all of Staunch's claims. *Staunch v. Continental Airlines*, 2007 WL 218729 (N.D. Ohio) (*Petitioner's Appx. pp. 19a-43a, R.50, Memorandum of Opinion and Order, Jt. Appx. pp. 853-69*).

---

[1] Citations to "*R.__*" refer to the docket number recorded by the District court. References to pages of the Joint Appendix are cited as "*Jt. Appx. p. ___*."

The district court determined that Staunch had not proved the elements of her interference and retaliation claims against Continental and that Continental demonstrated legitimate, nondiscriminatory reasons for Staunch's termination, i.e. deficient job performance and dependability violations. Finding that "Staunch offered no evidence that Continental interfered with, restrained, or denied her exercise of her FMLA rights during her pregnancy related leave," the court granted summary judgment on all claims. *Staunch v. Continental Airlines, Inc.*, 2007 WL 218729 (N.D. Ohio) at *8, 12 Wage & Hour Cas. 2d (BNA) (*Petitioner's Appx. pp. 35a-37a*).

Staunch appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed summary judgment in favor of Continental. *Staunch v. Continental Airlines, Inc.*, 511 F.3d 625 (6th Cir. 2008) (*Petitioner's Appx. pp. 1a-18a*). The Court of Appeals ruled on the alternative basis presented by Continental both in the district court and before the Court of Appeals that Staunch was not an eligible employee because she had not met the requisite threshold of having worked 1250 hours in the twelve-month period preceding her pregnancy leave. *Staunch v. Continental Airlines, Inc.*, 511 F.3d 625, 630-31 (6th Cir. 2007) (*Petitioner's Appx. pp. 8a-12a*). Staunch filed a Petition for *Rehearing En Banc* before the Sixth Circuit Court of Appeals. Pursuant to Federal Rule of Appellate Procedure 35(e), the Court of Appeals did not request Continental to file a responsive brief in opposition, and on April 11, 2008, declined to further

review the case. (*Respondent's Appx. pp. 38-39 docket entries of Sixth Circuit Court of Appeals* and *Petitioner's Appx. pp. 44a-45a*).

On July 9, 2008, Staunch filed a petition for a writ of certiorari in this Court limited to the sole technical issue of whether the Court of Appeals properly decided that Staunch was ineligible for FMLA coverage because she failed to produce sufficient evidence to defeat Continental's evidentiary submission in support of its motion for summary judgment showing that Staunch worked less than 1250 hours in the twelve months preceding her leave. Staunch does not discuss, in her petition, the various other substantive grounds relied upon by the district court in granting summary judgment.

STATEMENT OF THE FACTS

Staunch began working as a flight attendant for Continental on May 28, 1998. (*R.34, Staunch Tr. 41, 52, Jt. Appx. pp. 219-20*). During her tenure with Continental, Staunch was a member of the International Association of Machinists and Aerospace Workers ("IAM" or "the Union"), and the terms and conditions of her employment were dictated by a collective bargaining agreement ("CBA") between the Union and Continental (*Id. at 85, Ex.9, Jt. Appx. pp. 228, 299-305*).

Between January 21, 2002, and the end of April 2002, Staunch requested and was permitted to take

leave pursuant to her CBA on an intermittent basis due to her pregnancy, until she began a contractually-provided maternity leave of absence on May 1, 2002. (*R.35, DeVito Aff. ¶15, Jt. Appx. p. 408*; *R.34, Staunch Tr. 197, Exs.25, 38, Jt. Appx. pp. 238, 321-23, 330*). Staunch remained out on a combination of maternity and other company-offered leaves of absence from May 1, 2002, until the end of January 2003. (*R.34, Staunch Tr. 202, Jt. Appx. p. 239*).

Because of a violation while already on a termination warning level of progressive discipline, Staunch was discharged on April 29, 2004. (*Id. at 286, Ex.53, Jt. Appx. pp. 253, 376-77*).[2] Staunch grieved her discharge and it was denied. (*Id. at 295-98, Ex.54, Jt. Appx. pp. 256, 378*). Staunch then advanced her case to

---

[2] On April 22, 2004, it was discovered that Staunch had flown over the course of almost five months without a compliant safety manual. (*R.34, Staunch Tr. 269, 316, Ex 49, Jt. Appx. pp. 364-68.*) Specifically, she had failed to update her manual with Revision 23, issued December 10, 2003, dealing with safety measures involving smoke in an aircraft cabin. (*Id. at 272-74, Ex.50, Jt. Appx. pp. 250, 359-71.*) From the time Revision 23 had been issued, Staunch had flown with a non-compliant manual on December 14, 15, 20 and 21; January 11; February 8; and March 21 and 28. (*Id. at Ex.49, Jt. Appx. pp. 364-68.*) Staunch understood that flying without a compliant manual was both dangerous and prohibited. (*Id. at 273-74, 290, Jt. Appx. pp. 250, 254.*) She also understood that it was her responsibility to ensure she flew with a compliant manual. (*Id. at 318, Jt. Appx. p. 258.*) Nonetheless, she managed to check into the airport operations office, bypass at least four Inflight Weekly Briefings alerting flight attendants to the existence of Revision 23, and fly on several occasions without making her manual compliant. (*Id. at 282, Ex.52, Jt. Appx. pp. 252, 372-75.*)

arbitration before the System Board of Adjustment. (*Id. at 347, Ex.63, Jt. Appx. pp. 264, 390-98*). The Adjustment Board also upheld Staunch's discharge. (*Id*).

Continental's records established that between January 20, 2001, and January 21, 2002, the twelve-month period preceding Staunch's requested FMLA leave, Staunch worked less than 1,130 hours. (*Respondent's Appx. pp. 7-11, Sturchio Aff. at ¶3, Jt. Appx. pp. 410-11*). The hours worked were established by compiling the flight attendant pay registers detailing each flight Staunch worked and by adding time required by the CBA for check-in and de-briefing, as well as training time and ground time. (*Respondent's Appx. pp. 7-11, id. at ¶¶3-9, Jt. Appx. pp. 410-13*). The records showed, and Staunch admitted, that she was compensated for all work for which she was entitled to be paid. (*Respondent's Appx. pp. 7-11, id. at Ex.B to Sturchio Aff., Jt. Appx. pp. 421-34*; *R.34, Staunch Tr. 94, Jt. Appx. p. 230*).

The only evidence Staunch offered to rebut Continental's detailed, verified records were limited to her own non-specific, general descriptions and estimations of her alleged additional hours worked that were not reflected in Continental's records or any other records for that matter. Staunch admitted that the handwritten, undated and untitled list of tasks and hours contained in Exhibit 76 (*R.41, Ex.J to Staunch Affidavit, Jt. Appx. pp. 666-68*) is based solely on estimations made from her memory in response to Defendant's discovery requests. (*R.47, Reply Brief, Ex.B*; *Staunch Tr. 392, 397, 400, 409, 413-14, 418, Jt.*

6

Appx. pp. 763-64, 766-68). The contents of this document were not recorded contemporaneously with the alleged performance of the hours and tasks described therein, nor were they based on specific time records of any kind. (*Id.*)

Additionally, when viewed in light of the record evidence, Staunch's allegations regarding additional hours worked by her were disingenuous. The applicable CBA dictates that flight attendants must check in anywhere from 45 minutes to 1 hour, 15 minutes pre-take off for check-in time depending upon the size of the plane to which they are assigned. (*Respondent's Appx. pp. 8-9, R.36, Sturchio Aff. ¶¶5-6 and attachments thereto, Jt. Appx. pp. 411-12, 439*). Continental credited Staunch 45 minutes to one hour of check-in time for each of the approximately 140 flights she worked during the relevant time period. (*Id.*) This evidence notwithstanding, Staunch insisted in documents that were filed with the district court that she was entitled to an additional 250 hours "check in time (not included in flight time hours) 'a minimum of 1 hour prior to the first departure time at the start of every duty day.'" (*Petitioner's Appx. p. 73a, R.46, Ex.J to 1/8/07 Staunch Aff., Jt. Appx. p. 666*). However, in accordance with the CBA, that time was already included by Continental in the calculation of hours worked by Staunch.

Staunch also demanded an additional five hours' credit for "customs/immigration processing in Canada, Mexico, Caribbean." (*Petitioner's Appx. p. 73a, id. at Ex.J, Jt. Appx. p. 666*). However, Continental's records showed that, during the relevant time period,

7

Staunch made only two trips to Canada and no trips to Mexico or the Caribbean. (*R.36, 2001 Flight Hours attached to Sturchio Aff. at 7/14/01, 7/15/01, 11/7/01, 11/8/01, Jt. Appx. pp. 416-20*). Besides, any time that Staunch spent in customs is covered by the check-in time calculation discussed above and included in Continental's calculation of hours worked.

Pursuant to the collective bargaining agreement, Continental credited 8 hours and 30 minutes "hours worked" for the two 4 hour and 15 minute training sessions that Staunch attended in 2001. (*Respondent's Appx. p. 10, R.36, Sturchio Aff. ¶9, Jt. Appx. p. 413*). However, Staunch maintained before the District court that she was entitled to 20 hours for "annual recurrent training: classroom, workbook and prep" – a calculation at which she arrived from only her "memory." (*Petitioner's Appx. p. 73a, R.46, Ex.J to 1/8/07 Staunch Aff., Jt. Appx. p. 666*; *R.47, Ex.B*; *Staunch Tr. 408-09, Jt. Appx. pp. 765-66*). Apparently, Staunch wanted the District court to give her three times the credit for the two training sessions that she actually attended.

Thus, Staunch presented no specific credible evidence that she worked more hours than set forth in Continental's computation. She also presented no evidence that Continental's records were inaccurate. Staunch's sole argument before the District court in support of her contention that Continental's records were not accurate was based on the fact that, under the CBA, Continental does not pay flight attendants for all hours that might arguably be considered

the Fair Labor Standards Act
Opposition Brief p. 4, Jt
d this co 8

"hours worked" under the Fair Labor Standards Act ("FLSA"). (*R.46, Plaintiff's Opposition Brief p. 4, Jt. Appx. p. 648*).[3] Staunch based this conclusion on a total mischaracterization of Inflight Director Janie DeVito's deposition testimony – DeVito never testified about what goes into the calculation of *hours worked*. (*Compare Id. at p. 4, Jt. Appx. p. 648,* and *R.42, DeVito Tr. 83-94, Jt. Appx. pp. 605-08*). DeVito only testified about which flight attendant job functions are compensable pursuant to the terms of the CBA and how flight attendants are compensated for those tasks. (*Id.*)

Consequently, Staunch's observation did not demonstrate that Continental's records, attached to the affidavit of Mary Sturchio and summarized therein, were not accurate on the issue of how many hours Staunch worked during the relevant time period because Sturchio's conclusions were not based solely on hours paid. (*Respondent's Appx. pp. 7-11, R.36, Sturchio Aff. ¶8, Jt. Appx. p. 412*). To the contrary, Sturchio's conclusion regarding the hours worked by Staunch during the relevant time period pursuant to Continental's records was based on all of Staunch's "hours worked," including those for which she was not paid under the CBA. (*Respondent's Appx. pp. 7-11, id. at ¶¶4-9, Jt. App. pp. 411-13*).

---

[3] The CBA is relevant to determine whether time worked by Staunch is properly deemed "time worked" under the FLSA. *Knapp v. America West Airlines*, 207 Fed. Appx. 896, 12 Wage and Hour Cas. 2d 6 (10th Cir. 2006).

Because there was no evidence in the record to

9

Because there was no evidence in the record to show, by a just and reasonable inference, that Staunch worked more hours in addition to those reflected in Continental's records, Continental's evidence showing that Staunch worked less than 1,130 hours during the relevant time period was unrefuted.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS CASE DOES NOT WARRANT REVIEW UNDER THE STANDARDS OF SUPREME COURT RULE 10(c).

Supreme Court Rule 10(c) provides in pertinent part as follows: "A petition for a writ of certiorari is rarely granted when the asserted error consists of factual findings or the misapplication of a properly stated rule of law." The Court has long held: "We do not grant a certiorari to review evidence and discuss specific facts." *See U.S. v. Johnston*, 268 U.S. 220, 227 (1925).

Contrary to those principles, Staunch asks this Court to review detailed specific factual findings on the computation of Staunch's lack of necessary work hours to establish eligibility under the FMLA. She asks this Court to engulf itself in reviewing detailed affidavits and exhibits for evidentiary analysis. It is not the role of this Court to engage in such fact finding and evidentiary analysis.

Moreover, Staunch ignores the properly stated

10

Moreover, Staunch ignores the properly stated rule of law which is the focal point of the decision of the Court of Appeals – 29 C.F.R. §825.110(c). This regulation provides that where an employer does not "maintain" a record of the actual hours spent performing duties, the employer has the burden to prove that the employee did not work the requisite 1250 hours. The Court of Appeals applied that correct legal standard and held that "Continental has clearly demonstrated that Staunch did not work 1250 hours in the twelve months preceding her request for leave." *Continental*, 511 F.3d at 630 (*Petitioner's Appx. p. 11a*). This case involves the application of a properly stated rule of law, and Staunch's failure to refute evidence under that properly stated standard.

II. STAUNCH WAIVED HER ARGUMENTS BY NOT PRESENTING THEM TO THE SIXTH CIRCUIT PANEL

Before this Court, Staunch primarily argues that she is entitled to a relaxed standard for presenting evidence of her hours worked. Without citations to any Supreme Court or Circuit Court authority, she also briefly contends that she is presumed eligible under the notification requirements of 29 C.F.R. §825.110(d), and that she is presumed eligible as an exempt employee pursuant to 29 C.F.R. §825.500(f)(1). However, Staunch did not present any of these arguments to the Sixth Circuit Panel which heard the case. (*See Respondent's Appx. pp. 17-37, Excerpts from Final Brief of Appellant and Final Reply Brief of*

Appellant where there was no discussion on any of

11

Appellant where there was no discussion on any of these points).[4]

With respect to her argument on summary judgment standards, Staunch simply argued that there was an alleged conflict between the affidavits. She did not suggest that she was entitled to a relaxed standard allowing her to speculate on hours worked based solely upon her "recollection." She did not raise the notification argument for eligibility and the presumption of eligibility argument for exempt employees at all. (*Respondent's Appx. pp. 17-37*).

Accordingly, Staunch has waived these arguments. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976). Moreover, the Court also need not address arguments, even when raised, which were not decided. *See Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005), holding that "[t]he Court is a court of review, not first view." *See also Supreme Court Practice*, pp. 464-65 (Eugene Gressman, et al., editors, BNA Books, 9th Ed. 2007).

---

[4] Staunch did not raise these arguments before the Sixth Circuit Panel. Instead she raised them for the first time in *Petition for Rehearing En Banc*. By not timely raising these issues, she deprived the panel of the opportunity to review those issues in the original briefing.

III. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER CIRCUIT.

As an initial matter, the Court should not grant certiorari because the question of whether Staunch is an "eligible employee" under the FMLA is totally irrelevant to the case's ultimate outcome, given that the district court concluded that *all of her FMLA claims failed on the merits as a matter of law*. *Continental*, 2007 WL 218729 at * 8-9. (*Petitioner's Appx. pp. 36a-37a*). The Sixth Circuit correctly applied the controlling law, 29 C.F.R. §825.110(c), to the particular facts of Staunch's case and concluded that she is not entitled to take her case to a jury in the face of Continental's accurate, verified records. *Continental*, 511 F.3d at 630-31. (*Petitioner's Appx. p. 12a*). Only three circuit courts have addressed the burden of proof set forth in §825.110(c) in this context and they all agree that unsubstantiated testimony from the plaintiff cannot defeat a properly supported motion for summary judgment. Moreover, the Sixth Circuit's decision in this case is in keeping with Supreme Court precedent.

An FMLA claim cannot be maintained by a plaintiff who was not an "eligible employee." *Humenny v. Genex Corp., Inc.*, 390 F.3d 901, 906 (6th Cir. 2004). To be an "eligible employee," one must work at least 1250 hours during the twelve-month period prior to the commencement of the leave under

review. Section 825.110(c) of Title 29 of the Code of Federal Regulations provides:

> "In the event an employer does not maintain an accurate record of hours worked by an employee, . . . the employer has the burden of showing that the employee has not worked the requisite hours. In the event the employer is unable to meet this burden the employee is deemed to have met this test." (*Respondent's Appx. pp. 1-2*).

The Sixth Circuit decided that Staunch was not an "eligible employee" under the FMLA based on its correct application of §825.110(c) to the particular facts of this case.[5] Specifically, to meet its burden of proof, Continental submitted a verified statement from Mary Sturchio, the Manager of Human Resources for its Inflight Services Division in Newark and Cleveland. This verified statement was supported by three exhibits: a five-page chart of Staunch's flight hours, including dates and times spent by Staunch performing each of her job duties; thirteen pages of flight attendant pay records with data on all of Staunch's work-related activities; and relevant sections of the CBA between Continental and Staunch's union defining different categories of

---

[5] Staunch's brief does not analyze the standards of proof controlling this case pursuant to 29 C.F.R. §825.110(c). Indeed, Staunch cites the regulation just once and entirely ignores the portion of the regulation dealing with the employer's burden to prove that the employee did not work 1250 hours.

time worked by flight attendants. The verified statement explained the basis for each and every determination that yielded Sturchio's ultimate conclusion that Staunch worked less than 1,130 hours during the relevant time period. (*Respondent's Appx. pp. 7-11*).

In response, Staunch provided an affidavit from herself and an undated, generalized list of tasks and hours that she compiled based solely on her own personal recollection. She never presented any evidence to prove that she performed these alleged uncompensated tasks on specific days, nor did she present any evidence to refute Continental's records and analysis proving that she had not worked the requisite 1250 hours. *Continental*, 511 F.3d at 630 (*Petitioner's Appx. p. 11a*). Staunch now asks this Court to revisit the Circuit Court's findings regarding the sufficiency of her evidence. The question of Staunch's FMLA eligibility is a routine foundational question ordinarily addressed by lower courts. The Sixth Circuit reviewed the evidentiary record of this case, applied it to §825.110(c), and correctly found that Staunch was not an eligible employee under the FMLA.

Despite the fact that §825.110(c) has been law for over 13 years, only three circuit courts have addressed it in the context of whether an employer has met the burden of proof in a case where the employee produced nothing more than her own unsubstantiated testimony to refute the employer's accurate records. However, the three courts which have examined the issue are all harmonious. *Staunch v. Continental Airlines*, 511 F.3d 625 (6th Cir. 2008); *Knapp v. America*

West Airlines, 207 Fed. Appx. 896, 12 Wage & Hour Cas. 2d 6 (10th Cir. 2006); *Kosakow v. New Rochelle Radiology Associates*, 274 F.3d 706 (2nd Cir. 2001).

The Sixth Circuit joins the Tenth Circuit in finding that an employee who produced nothing more than her own unsubstantiated testimony to refute her employer's records cannot defeat summary judgment under §825.110(c). In *Knapp*, the Tenth Circuit affirmed summary judgment for the employer on the "eligible employee" issue based on the airline's records of the flight attendant's active-duty, training, layover and reserve duty time. 207 Fed. Appx. at 897, 12 Wage & Hour Cas. 2d at 6. The flight attendant "could have produced additional evidence concerning the restrictions on her activities" in order to prove her alleged additional hours worked, but failed to do so. Therefore, summary judgment for the employer was correctly affirmed pursuant to §825.110(c).

In this case, in keeping with *Knapp*, the Sixth Circuit relied on the Sturchio statement compiling pay registers detailing check-in, de-briefing, training and ground time in light of the relevant provisions of the CBA. In response, Staunch submitted an unsubstantiated affidavit containing generalized approximations based on her own recollection, but "failed to present evidence of specific days and hours that she worked performing these alleged uncompensated tasks." *Continental*, 511 F.3d at 630. The Sixth Circuit correctly found that this generalized list did not set forth the specific facts necessary to show a genuine issue for trial.

District court cases involving flight attendants have resulted in routine summary judgment for the airlines under similar analyses. *Rich v. Delta Airlines, Inc.*, 921 F. Supp. 767, 775 (N.D. Ga. 1996) (employer's affidavit interpreting time records was sufficient to meet the employer's burden of proof under §825.110(c)); *Cantrell v. Delta Airlines, Inc.*, 2 F. Supp. 2d 1460, 1463 (N.D. Ga. 1998) (accord); *Robinson-Scott v. Delta Airlines, Inc.*, 4 F. Supp. 2d 1183 (N.D. Ga. 1998) (accord). There are no negative references to any of those three cases.

In the only case in which summary judgment for the employer was vacated, the employee had produced additional evidence to substantiate the allegations contained in her own affidavit. *See Kosakow*, 274 F.3d at 706. The trial court found that the plaintiff could not defeat summary judgment based on her own unsubstantiated allegations. *Kosakow v. New Rochelle Radiology Associates*, 88 F. Supp. 2d 199 (S.D.N.Y. 2000). On appeal, however, the Second Circuit vacated and remanded because the plaintiff also had submitted affidavits of two co-workers stating that the plaintiff worked the extra hours. These two affidavits, combined with the plaintiff's allegations, were enough to create a question of fact. *Kosakow*, 274 F.3d at 706. In the instant case, Staunch presented no evidence to support her own self-serving, vague and generalized recollection.

The Sixth Circuit's decision in this case is also completely consistent with the decisions of this Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680

(1946), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Both *Mt. Clemens* and *Liberty Lobby* deal with basic principles of law regarding what creates a "genuine question of fact" for trial. The Circuit Court's finding that Staunch was not an "eligible employee" under the FMLA does not run afoul of *Mt. Clemens* or *Liberty Lobby* and was the direct result of Staunch's sole reliance on pure inadmissible conjecture that was insufficient to create a question of fact.

Consistent with *Mt. Clemens*, the Sixth Circuit correctly determined that Staunch was not entitled to the relaxed "benefit of the doubt" standard she now urges this Court to impose because she did not refute Continental's accurate records of her hours worked. In *Mt. Clemens*, this Court said that "[u]nless the employer can provide accurate estimates, it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence as to the amount of time spent in these activities in excess of the productive working time." *Id.* at 693. In *Mt. Clemens*, the employer did not present any evidence regarding hours worked by the employees that were not reflected on the time clock. 328 U.S. at 689. Consequently, this Court determined that the employees were entitled to the "benefit of the doubt."

In this case, however, Continental *did produce* accurate records proving the hours worked by Staunch and the Sixth Circuit correctly found that Continental had met its burden of proof under §825.110(c) based on these records. In the face of Continental's accurate records, *Mt. Clemens* does not

allow Staunch to rest on her own generalized and unsubstantiated affidavit.[6]

The Sixth Circuit also correctly applied *Mt. Clemens* to a previous case with strikingly similar facts. *See Myers v. The Copper Cellar Corp.*, 192 F.3d 546, 551-52 (6th Cir. 1999). The plaintiffs in *Myers* merely invoked the defendant's payroll records combined with their own "imprecise" testimony. The defendant had produced "precise records from which the plaintiffs could have conclusively reconstructed

---

[6] Staunch's argument that she is *presumed eligible* under the FMLA is also unavailing. (*Petitioner's Brief at p. 23* (discussing 29 C.F.R. §825.500(f)(1))). Such a presumption arises only if the employer of exempt employees did not keep records. Continental kept records. Therefore, this regulation is irrelevant to the case at bar. Similarly, Staunch's argument of eligibility under the notice requirements of 29 C.F.R. §825.110(d) is unavailing. Staunch argues that Continental originally confirmed eligibility on FMLA forms and did not subsequently inform Staunch that she was ineligible. She then argues that those facts support Staunch's contention that she was an eligible employee. (*Petitioner's Brief at p. 29*). However, every circuit court of appeals which has reviewed 29 C.F.R. §825.110(d) to the extent that it creates eligibility requirements – in contrast with the specific 1250-hour requirement of 29 C.F.R. §825.110(a)(2) – has declared the regulation invalid. *See Woodford v. Community Action of Greene County*, 268 F.3d 51 (2d. Cir. 2001); *Brungart v. BellSouth Telecomms Inc.*, 231 F.3d 791, 797 (11th Cir. 2000); *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 582-83 (7th Cir. 2000); *Knapp v. America West Airlines*, 207 Fed. Appx. 896 (10th Cir. 2006), *Evanoff v. Minneapolis Public Schools*, 11 Fed. Appx. 670 (unpublished) (8th Cir. 2001). In short, there is no conflict among the courts of appeals in interpreting 29 C.F.R. §825.500(f)(1) or 29 C.F.R. §825.110(d).

the definite days and hours during which each plaintiff worked during a designated [shift]." *Id.* at 551. Just as in this case, the Sixth Circuit found that the plaintiffs were not entitled to an inference in their favor because they produced no specific evidence to refute the defendant's records.

Additionally, *Mt. Clemens* is not an FMLA case. It is an FLSA case and does not address the burden of proof in an FMLA case under §825.110(c). Moreover, like *Mt. Clemens*, the FLSA cases cited by Staunch all involve employers subject to the statutory duty to keep time records. Airlines are not subject to the overtime obligations of the FLSA and are thus exempt from the obligation to keep hourly time records. *See Rich,* 921 F. Supp. at 773.

However, *Mt. Clemens* does mirror the standards of §825.110(c) in its holding that where the employer has not kept proper and accurate records and the employee has produced "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference," the employer can still prevail by "com[ing] forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.* at 687-88. In this case, Continental did both – it produced the Sturchio statement and exhibits thereto with specific evidence detailing Staunch's days, times and places worked, and it simultaneously discredited the generalized and

unsubstantiated estimations in Staunch's affidavit because she did not refute Continental's calculations.[7]

The Sixth Circuit also was entirely faithful to *Liberty Lobby* and its mandate that plaintiffs "set forth the specific facts showing that there is a genuine issue for trial" rather than merely "rest[ing] upon mere allegation or denials." 477 U.S. at 256. In *Liberty Lobby*, this Court recognized that a plaintiff cannot withstand summary judgment "without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendan[t]." *Id.* Rather, "the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Id.* at 257.

The Sixth Circuit's ruling in *Staunch* adheres to these fundamental standards. Continental produced specific evidence of the hours worked by Staunch.[8] In response, Staunch produced her generalized and unsubstantiated affidavit based on her own approximations and recollections. Under *Liberty Lobby*, such

---

[7] Indeed, the Sixth Circuit found Staunch's allegations of additional hours worked to be "inflated and unsupported."

[8] Staunch is incorrect in her assertion that Sturchio should not have considered the provisions of the CBA in rendering her determination as to the hours worked by Staunch. To the contrary, this Court has stated that the determination of "hours worked" under the FLSA requires, among other things, consideration of the agreement of the parties. *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944); *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).

an affidavit is not sufficient to defeat summary judgment. Consequently, the Sixth Circuit correctly found Continental's evidence was unrefuted.

Liberty Lobby requires that plaintiffs "present affirmative evidence" or lose on summary judgment, "even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery." Staunch had the opportunity, but made no attempt to explore Continental's records via additional discovery, such as a Rule 30(b)(6) deposition. Therefore, Staunch has absolutely no basis to claim that her affidavit created a genuine triable issue.[9]

---

[9] Staunch also complains that the Circuit Court based its decision on the alternative grounds of the eligibility issue and that Continental filed no cross appeal from the decision of the district court which dismissed the case on the merits but did not rule on the eligibility issue. Of course Staunch's protestations are baseless because an appellate court can affirm summary judgment on the basis of any argument raised in the district court. *See Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). A prevailing party is entitled to "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the district court or the Court of Appeals." Thus a cross appeal or cross petition is not necessary. *See Supreme Court Practice*, p. 489 (Eugene Gressman, et al., editors BNA Books, 9th Ed. 2007). Continental raised the eligibility issue both in the district court and in the Court of Appeals. (*Petitioner's Appx. p. 16 and Respondent's Appx. pp. 12-15, excerpts from Continental's Amended Memorandum in Support of its Motion for Summary Judgment*).

CONCLUSION

There is no reason why the Court should grant the petition. Well-settled law on the summary judgment standards and standards in FMLA cases have been followed by the Sixth Circuit. There is no conflict with any decision of this Court or any other circuit court of appeals on the facts of this case. There are no compelling reasons for the Court to review this routine summary judgment decision.

Respectfully submitted,

ROBERT M. WOLFF
Counsel of Record
JANETTE M. LOUARD
LISA A. COTTLE
LITTLER MENDELSON
1100 Superior Avenue, 20th Floor
Cleveland, Ohio 44114
Phone: (216) 696-7600
Facsimile: (216) 696-2038
rwolff@littler.com
jlouard@littler.com
lcottle@littler.com

Attorneys for Respondent

August 13, 2008

APPENDIX A
Regulations and Rules

"29 C.F.R. §825.110 Which employees are "eligible" to take leave under FMLA?:

(a) An "eligible employee" is an employee of a covered employer who:

(1) Has been employed by the employer for at least 12 months, and

(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and

(3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. (See §825.105(a) regarding employees who work outside the U.S.)

(c) Whether an employer has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work (see 29 CFR Part 785). The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used. In the event an employer does not maintain an accurate record of hours worked

by an employee, including for employees who are exempt from FLSA's requirement that a record be kept for their hours worked (e.g., bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR Part 541), the employer has the burden of showing that the employee has not worked the requisite hours. In the event the employer is unable to meet this burden the employee is deemed to have met this test. See also §825.500(f). For this purpose, full-time teachers (see §825.800 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution are deemed to meet the 1,250 hour test. An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not "eligible" for FMLA leave.

(d) The determinations of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date leave commences. If an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employer confirms

eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility. In the latter case, if the employer does not advise the employee whether the employee is eligible as soon as practicable (i.e., two business days absent extenuating circumstances) after the date employee eligibility is determined, the employee will have satisfied the notice requirements and the notice of leave is considered current and outstanding until the employer does advise. If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave. Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice."

29 C.F.R. §825.500 What records must an employer keep to comply with the FMLA?

(f) If FMLA-eligible employees are not subject to FLSA's recordkeeping regulations for purposes of minimum wage or overtime compliance (i.e., not covered by or exempt from FLSA), an employer need not keep a record of actual hours worked (as otherwise required under FLSA, 29 CFR 516.2(a)(7)), provided that:

(1) eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and

Supreme Court Rule 10.
Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question

in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Federal Rule of Appellate Procedure 35.
En Banc Determination

(a) **When Hearing or Rehearing En Banc May Be Ordered.** A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(e) **Response.** No response may be filed to a petition for an en banc consideration unless the court orders a response.

Federal Rule of Civil Procedure 30.
Depositions Upon Oral Examination

(b) Notice of Examination: General Requirements; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership

or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

APPENDIX B

Mary Sturchio affidavit

[Attachments Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

HOLLY L. STAUNCH Plaintiff vs. CONTINENTAL AIRLINES, INC. Defendant	CASE NO. 06 CV 1011 JUDGE JAMES GWIN

VERIFIED STATEMENT OF MARY STURCHIO

I, Mary Sturchio, hereby verify and state as follows:

1. I have personal knowledge of the statements made in this Verified Statement submitted in support of Defendant's motion for summary judgment. This information is based upon my personal knowledge and certain business records of Continental Airlines, Inc. ("Continental"), which are attached to this Verified Statement.

2. Continental employs me as the Manager of Human Resources for the Inflight Services division, Newark and Cleveland bases. I have been in this position since July 2000 and have worked for Continental since August 1997.

3. Based upon Continental records and as explained in this verification, I calculate that Holly Staunch's flight time, check-in time, ground time, de-brief time, and training time, in the period from

January 1, 2001, through January 22, 2002, total 1205 hours and 52 minutes. **Attachment A** contains a chart summarizing these calculations. Deducting flight and ground time from January 1, 2001, through January 20, 2001, I calculate that Holly Staunch's flight time, check-in time, ground time, de-brief time, and training from January 21, 2001, through January 22, 2002, total 1127 hours and 41 minutes. See **Attachment A**.

4. **Flight Time:** I relied upon flight attendant pay registers for the applicable months to calculate the flight hours Ms. Staunch worked. Copies of Ms. Staunch's flight attendant pay registers for the months of January 2001 through January 2002 are attached as **Attachment B**. The flight hours per day for each trip are recorded in the column entitled "Pay Time" on these pay registers.

5. **Check-In:** I relied on these pay registers and the contractual provisions contained in the collective bargaining agreement in effect in 2001 and 2002 to calculate the hours Ms. Staunch spent performing check-in activities in connection with the flights she worked during that same time period. Copies of the contractual provisions from the April 1, 2000, through October 1, 2004 Agreement between Continental Airlines, Inc. and International Association of Machinists and Aerospace Workers (CBA) are attached to this verification as **Attachment C**. Under these provisions, flight attendants must check-in for flights on aircrafts with more than 160 customer seats one hour and 15 minutes before the

scheduled flight time if the flight departs from the flight attendant's base (here, Cleveland, which is designated "CLE" on the flight attendant pay registers) and one hour before flight time at all layover points. For flights on aircrafts with 160 or fewer customer seats, a flight attendant must report for check in one hour before the fight if the flight departs from the flight attendant's base and 45 minutes before the flight at all layover points. A flight attendant on a deadheading flight must report 45 minutes before the flight leaves from any departure location and on any type of aircraft. *See* CBA Page 5-3, **Attachment C**.

6. In order to determine the appropriate check-in time for each flight, I first determined the type of aircraft Ms. Staunch worked in each pairing by reading the flight attendant pay registers. The pairing numbers are listed by date of the flight on the line reading "PS," which stands for "Pairing Summary." The first number in each pairing indicates the aircraft type. A designation of "2" stands for a 777 aircraft, "3" is a 757 aircraft, "4" is a 767-400 aircraft, and "5" is a 737 aircraft. Ms. Staunch always worked on a 737 aircraft. The 737 has fewer than 160 customer seats.

7. **Debrief Time:** Under the applicable contractual provision, a flight attendant is expected to remain on a flight on which she is a working crew member for 15 minutes after the flight blocks in or, if Customs clearance is required for the flight, 30 minutes after the flight blocks. *See* CBA page 5-5,

Attachment C. I included the applicable hours for this "debrief time" in calculating Ms. Staunch's hours worked for purposes of this verification.

8. **Ground Time:** Although not compensable time under the CBA, I also have included ground time for the flights flown by Ms. Staunch. Ground time is the time between flight legs when attendants are not necessarily on the plane (after debrief and before check-in), but remain on duty. I included in my calculations the ground time between the flights flown by Ms. Staunch between January 1, 2001, and January 22, 2002.

9. **Training Time:** The CBA provides that flight attendants will be paid 4:15 minutes per day of initial new equipment training or recurrent training. *See* CBA page 6-2, **Attachment C**. During the period from January 2001 through December 2001, Ms. Staunch attended training on two days, April 22 and April 23, 2001. *See* April 2001 flight attendant pay register, **Attachment B**. I included 4:15 for each of these days of training as hours worked. **Attachment A**. Ms. Staunch did not attend any training in January 2002. **Attachment B**.

10. Section 14 of the CBA explains what maternity leave is given to flight attendants. *See* CBA pages 14-1 through 14-10, **Attachment C**. Maternity and pregnancy-related conditions are treated like any other disability under the CBA. *See* CBA page 14-5, **Attachment C**. A flight attendant may continue to fly through the end of her 27th week of pregnancy

App. 11

provided she is fit to perform her duties. Starting the 28th week, she will be placed on a maternity leave of absence. *See* CBA page 14-5, **Attachment C**. At the time of the birth of the baby, the flight attendant may, at her option, elect on a one-time basis to extend the maternity leave up to twelve (12) months following her pregnancy. A flight attendant on a maternity leave of absence will be eligible for sick leave benefits until eight weeks following the date of delivery with verification from her doctor that she is unable to fly. *See* CBA page 14-5, **Attachment C**.

11. Pursuant to 28 U.S.C. § 1746, I verify under penalty of perjury that I have read the foregoing Verified Statement and it is true and correct.

Executed this 14 day of December, 2006.

/s/ Mary Sturchio
Mary Sturchio

/s/ Alta J. Jordan
ALTA J. JORDAN
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires June 17, 2008

APPENDIX C

Excerpts from Defendant Continental Airlines, Inc.'s Amended Memorandum in Support of its Motion for Summary Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HOLLY L. STAUNCH,	)	CASE NO. 06 CV 1011
Plaintiff,	)	JUDGE JAMES GWIN
vs.	)	
CONTINENTAL AIRLINES, INC.,	)	
Defendant.	)	

DEFENDANT CONTINENTAL AIRLINES, INC.'S AMENDED MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Janette M. Louard (0066257)
Lisa A. Cottle (0072809)
DUVIN, CAHN & HUTTON
Erieview Tower, 20th Floor
1301 East Ninth Street
Cleveland, OH 44114
Phone: (216) 696-7600
Fax: (216) 696-2038
e-mail: jlouard@duvin.com
lcottle@duvin.com

Attorneys for Defendant,
Continental Airlines, Inc.

* * *

[8] the proffered reason is a pretext for retaliation. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

As a matter of law, Plaintiff cannot establish either of her FMLA claims because she was never eligible for leave benefits under the FMLA. Moreover, even if Plaintiff had been eligible for FMLA benefits, her interference claim fails because Continental did not deny her requested pregnancy-related leaves. Similarly, Plaintiff's retaliation claim fails as a matter of law because the leave time which Plaintiff alleges to have been FMLA-protected did not contribute in any way to Continental's decision to terminate her employment. Rather, Continental discharged Plaintiff for the legitimate non-retaliatory reason that she flew with a non-compliant safety manual while she was on Termination Warning.

1. Plaintiff Was Not An "Eligible Employee" Under the FMLA.

An FMLA claim cannot be maintained by a plaintiff who was not an "eligible employee." *Humenny v. Genex Corp., Inc.*, 390 F.3d 901, 906 (6th Cir. 2004) (stating that "the FMLA's 'eligible employee requirement' applies in all FMLA cases"). To be an "eligible employee," Plaintiff must prove that she worked for at least 1,250 hours with Continental during the 12-month period prior to the commencement of the leave under review. 29 C.F.R. § 825.110(a)(2). Plaintiff claims that she was an "eligible employee" under the FMLA when she sought leave related to her pregnancy beginning on January

21, 2002.[10] (Am. Compl. ¶¶ 15-16; Pltf. Dep. 429, Ex. 25.) However, because the undisputed facts demonstrate that Plaintiff worked less than the requisite 1,250 hours before taking her leave, she cannot establish that she was an "eligible employee" under the FMLA.

Whether an employee has worked the minimum 1,250 hours of service is determined according to the Fair Labor Standards Act ("FLSA") standards for defining compensable time, as set forth in 29 U.S.C. §207 and 29 C.F.R. Part 785. 29 C.F.R. § 825.110(c). To avoid summary judgment on this [9] issue, Plaintiff must demonstrate a question of material fact as to the accuracy of Continental's time records and show that Continental allowed Plaintiff to perform additional unrecorded hours of work for which she was not compensated. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946); *Cantrell v. Delta Airlines*, 2 F. Supp. 2d 1460, 1462-1463 (N.D. Ga. 1998) (stating that plaintiff has to show the employer's records are not accurate and present evidence on the issue of hours worked that is contrary to the employer's evidence).

The employer's proper and accurate records are generally dispositive of the number of hours worked

---

[10] Plaintiff claims that all of her absences between January 21 and April 30, 2002, were protected by the FMLA. (Pltf. Dep. 429.) Plaintiff is not contending that her sick call on January 1 and 2, 2002 was related to her pregnancy. (Pltf. Dep. 149.)

by the employee. *Anderson*, 328 U.S. at 687. In this case, the evidence demonstrates that Continental did keep proper and accurate monthly time records. (Affidavit of Mary Sturchio (hereafter, "Sturchio Aff.") ¶ 4.)[11] Therefore, Continental's records are dispositive of whether Plaintiff worked 1,250 hours prior to taking the leave she alleges to have been FMLA-protected.

Continental's records establish that between January 20, 2001, and January 21, 2002, Plaintiff worked less than 1130 hours. (Sturchio Aff. ¶ 3.) The hours worked were established by compiling the flight attendant pay registers detailing each flight Plaintiff worked, and adding time required by the collective bargaining agreement for check-in and debriefing, as well as training time and ground time. (Sturchio Aff. ¶¶ 3-9.) The records show, and Plaintiff admits, that she was compensated for all work for which she was entitled to receive compensation. (Attachment B to Sturchio Aff., Pltf. Dep. 94.) Consequently, because Plaintiff did not work 1,250 hours in the twelve months preceding the leave in question, she was not an "eligible employee," and thus, was not entitled to benefits under the FMLA. Summary judgment is proper for Defendant on both of Plaintiff's FMLA claims on this ground alone.

---

[11] The Affidavit of Mary Sturchio, manager of Human Resources for Continental's Inflight Services, is attached hereto as Exhibit C.

2. <u>There Are No Facts to Support Plaintiff's Interference Claim.</u>

Even if Plaintiff were an eligible employee under the FMLA, to establish an interference claim, Plaintiff would be required to show that Continental denied her requests for pregnancy-related leave.

* * *

APPENDIX D

Excerpts from Final Brief of the Appellant in the Sixth Circuit Court of Appeals

IN THE SIXTH CIRCUIT COURT OF APPEALS

HOLLY L. STAUNCH,	)	CASE NO. 07-3315
Plaintiff-Appellant	)	
	)	
-vs-	)	
CONTINENTAL AIRLINES	)	
	)	
Defendant-Appellee	)	

****

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

FINAL BRIEF OF THE APPELLANT

****

MARTIN S. HUME, ESQ. (0020422)
MARTIN S. HUME CO., L.P.A.
6 Federal Plaza Central, Suite 905
Youngstown, OH 44504
Telephone: (330) 746-8491
Attorney for Plaintiff-Appellant
Holly L. Staunch

JANNETTE M. LOUARD, ESQ.
LISA A. COTTLE, ESQ.
LITTLER, MENDELSON
1100 Superior Avenue
20th Floor
Cleveland, OH 44114-1886
Attorneys for Defendant-Appellee
Continental Airlines, Inc.

* * *

[20] ARGUMENT

APPLICABLE STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. See *City Mgmt. Corp. v. United States Chem. Co.*, 43 F.3d 244, 250 (6th Cir. 1994). The appellate court must determine, viewing the evidence most favorably to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the law. If the nonmoving party cannot make a sufficient showing on an essential element of its case, the moving party will be entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF CONTINENTAL ON STAUNCH'S CLAIM OF UNLAWFUL INTERFERENCE WITH HER RIGHTS UNDER THE FAMILY MEDICAL LEAVE ACT.

To prevail on an interference claim under the FMLA, "a plaintiff must establish that (1) she is an 'eligible employee,' 29 U.S.C. § 2611(2); (2) the defendant is an 'employer,' 29 U.S.C. § 2611(4); (3) the employee was entitled to leave under the FMLA, 29 U.S.C. § 2612(a)(1); (4) the employee gave the employer notice of his intention to take leave, 29 U.S.C. § 2612(e)(1); and (5) the [21] employer denied the employee FMLA benefits to which he was entitled."

Cavin v. Honda of Am. Mfg., Inc., 346 F.3d 713, 719 (6th Cir. 2003).

Under the FMLA, leave made necessary because of a serious health condition that makes the employee unable to perform the functions of the position of such employee may be taken intermittently or on a reduced leave schedule when medically necessary. 29 USCS § 2612(b)(1). In this case, Continental interfered with Staunch's exercise of her FMLA rights by using her previously approved intermittent FMLA time off from work against Staunch in later disciplinary proceedings against her.

An employer violates the FMLA when it violates either the FMLA statute itself (§ 2615 et seq. or § 2614 et seq.) or its implementing regulations. As stated in 29 C.F.R. § 825.220(b), "any violations of the Act **or of these regulations** constitute interfering with, restraining, or denying the exercise of rights provided by the Act." 29 C.F.R. § 825.220(b) (emphasis added). See also *Schmauch v. Honda of America Manufacturing, Inc.*, 295 F. Supp.2d 823, 828 (S.D. Ohio 2003).

29 C.F.R. § 825.220, entitled: "How are employees protected who request leave or otherwise assert FMLA rights?" states, in pertinent part:

> "Interfering with" the exercise of an employee's rights would include, for example, *not only refusing to authorize FMLA leave,* [22] *but discouraging an employee from using such leave.*

29 CFR § 825.220(b) (emphasis added).

And, section (c) provides that:

> An employer is *prohibited from discriminating against employees* or prospective employees *who have used FMLA leave*. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, *employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.*

29 CFR § 825.220(c) (emphasis added).

In light of the fact that any violation of the FMLA or its implementing regulations constitutes interference with an employee's FMLA rights, the court in the case of *Bradley v. Mary Rutan Hospital Assoc,* 322 F. Supp. 2d 926; 2004 U.S. Dist. LEXIS 12224; 9 Wage & Hour Cas. 2d (BNA) 1424 (2004), decided that it was not necessary to analyze FMLA claims as being either "interference" or "retaliation" claims, and that the burden shifting analysis common to other employment discrimination claims need not apply to FMLA claims. Rather, the court stated:

> This Court prefers, instead, to adopt a single framework for all claims brought by a plaintiff who alleges that her employer used the fact that she took FMLA leave against

her in some unlawful way (by discharging her, not promoting her, denying her benefits to which she [23] otherwise would have been entitled. In such cases, plaintiff would have the burden of establishing that:

1. She is an "eligible employee," 29 U.S.C. § 2611(2);

2. Defendant is an "employer," 29 U.S.C. § 2611(4);

3. She was entitled to take leave for one of the reasons set forth in 29 U.S.C. § 2612(a)(1);

4. She gave proper notice of her intention to take leave, 29 C.F.R. § 825.302; and

5. The employer somehow used the leave against her and in an unlawful manner, as provided in either the statute *or* regulations.

Plaintiff has to prove each of those elements by a preponderance of the evidence in order to prevail.

Appellant respectfully suggests that this analytical framework is superior to trying to adapt the McDonnell Douglas framework to FMLA cases. It is consistent with the law as written and the implementing regulations. Applying this framework to Staunch's claims, it is apparent that Continental was not entitled to summary judgment in its favor. Staunch was an eligible employee. (R.D. 30, Staunch Affidavit at paragraph 10, Jt. Appx. vol. I p. 178).

Continental is an "employer" as defined in 29 U.S.C. 2611(4) as it had more than fifty employees within 75 miles of Cleveland, Ohio, and was engaged in commerce. (See R.D. 46, Continental Airlines Answers to Interrogatories No. 16, Jt. Appx. vol. IV pp. 677-678), (R.D. 42, DeVito Depo. pp. 9-10, Jt. Appx. vol. III pp. 586-587). Staunch was entitled to take leave for one of the reasons set forth in 29 U.S.C. 2612(a), to wit: her own serious health condition resulting from complications of her [24] pregnancy that required her to be under the continuing care of her physician and intermittently prevented her from performing her work as a flight attendant. (See R.D. 41, Exhibit C to Staunch Affidavit of December 18, 2006, Jt. Appx. vol. III pp. 568-570). Staunch gave Continental proper notice of her intention to take leave and she was told her leave request was approved. (R.D. 41, Exhibits C and E to Staunch Affidavit of December 18, 2006, Jt. Appx. vol. III pp. 568-570, 576). Continental used the leave taken by Staunch against her in an unlawful manner, by using the time Staunch took off from work due to her serious health condition against her in later disciplinary proceedings, which is expressly prohibited by the regulations. 29 CFR § 825.220(c). (See R.D. 41, Exhibits F and G to Staunch Affidavit of December 18, 2006, Jt. Appx. vol. III pp. 577-580, R.D. 49, Exhibit H to Staunch Affidavit of December 18, 2006, Jt. Appx. vol IV pp. 841-842, R.D. 46, Staunch Answers to Interrogatories No. 2, Jt. Appx. vol. IV p. 690). Staunch was specifically told by her supervisors that she was placed on termination warning due to her pregnancy related FMLA sick

calls, and that her termination in April 2004 was based upon her work history that included her pregnancy related FMLA qualifying sick calls. Thus, Staunch can establish all of the elements necessary to prove a violation of and interference with her FMLA rights, and therefore, Continental was not entitled to summary judgment in its favor on Staunch's FMLA interference claims.

[25] II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF CONTINENTAL ON STAUNCH'S CLAIM OF UNLAWFUL RETALIATION AGAINST HER FOR EXERCISING HER RIGHTS UNDER THE FMLA.

Past Sixth Circuit precedent has held that subsections (a)(1) and (a)(2) of 29 U.S.C. § 2615 establish two distinct theories of recovery: those of entitlement (interference) and of retaliation. *Edgar v. JAC Prods., Inc.*, 443 F.3d 501, 507 (6th Cir. 2006). Under the entitlement theory, "[t]he issue is simply whether the employer provided its employee the entitlements set forth in the FMLA – for example, a twelve-week leave or reinstatement after taking a medical leave." Id. (citing *Arban v. W. Publ. Corp.*, 345 F.3d 390, 401 (6th Cir. 2003)). The employer's intent is not a relevant part of the entitlement inquiry under § 2615, and the Court need not apply the *McDonnell Douglas* burden-shifting test in such cases. Id. at 507, 508; see also *Schmauch v. Honda of Am. Mfg., Inc.*, 295 F. Supp. 2d 823, 828-31 (S.D. Ohio 2003).

Under the retaliation theory of recovery, on the other hand, an employer's motive is an integral part of the analysis. *Edgar,* 443 F.3d at 508 (citing *Hodgens v. Gen. Dynamics Corp.,* 144 F.3d 151, 160 (1st Cir. 1998)). "The employer's motive is relevant because retaliation claims impose liability on employers that act against employees specifically *because* those employees invoked their FMLA rights." Id.

[26] Where there is direct evidence of retaliatory motive, there is no need for a *McDonnell Douglas* prima facie case analysis. See *Gibson v. City of Louisville,* 336 F.3d 511, 513 (6th Cir. 2003); *Skrjanc v. Great Lakes Power Service Co.,* 272 F.3d 309, 314 (6th Cir. 2001). In a case factually similar to the present case, the court in *Jones v. Select Industries Corp,* 2006 U.S. Dist. LEXIS 40019 (S.D. Ohio 2006), stated:

> Jones claims to have direct evidence of discrimination that Dankworth and Select interfered with her FMLA rights, obviating the need for a *McDonnell-Douglas prima facie* case analysis. While the copies of the termination documentation submitted to the Court are illegible, Barr read the document as stating, above Mike Dankworth's signature.
>
> > Termination for cause under the new attendance policy. Alice has exceeded the maximum allowable levels as well as the total – totality of excused and unexcused absences from the period 9/30/96 to 5/12/02.

> Barr Depo. at 66. This written explanation and Dankworth's later explanation at his deposition are susceptible to the interpretation that excused absences, that is, FMLA-protected absences, played a role in the decision to terminate Jones.

Thus, in the *Jones* case, the court denied summary judgment to the employer. In the present case, as in *Jones,* Continental's documents are susceptible to the interpretation that Staunch's FMLA-protected absences were used to place her on a termination warning and to terminate her employment. Therefore, Continental was not entitled to summary judgment.

[27] Even if the burden shifting approach was proper in this case, Continental was still not entitled to summary judgment. Under the *McDonnell Douglas* framework, Plaintiff must first establish a *prima facie* case of retaliation by showing that: (1) she availed herself of a protected right under the FMLA; (2) she was adversely affected by an employment decision; and (3) there is a causal connection between her exercise of a right under the FMLA and the adverse employment decision. *Skrjanc,* 272 F.3d at 314. Once Plaintiff establishes a *prima facie* case, the burden shifts to Defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. Id. at 315. If Defendant meets this burden, Plaintiff must "produce sufficient evidence from which the jury may reasonably reject the employer's explanation." *Manzer v. Diamond Shamrock*

Chems. Co., 29 F.3d 1078, 1083 (6th Cir. 1994). In other words, Plaintiff must show that the reason offered by Defendant was pretextual. *Paxton v. The Wasserstrom Company,* 2006 U.S. Dist. LEXIS 15457 (S.D. Ohio 2006).

The burden of demonstrating a causal connection between an employee's FMLA-qualifying leave and termination, at the *prima facie* stage, is minimal. See *Paxton,* supra, *Dage v. Time Warner Cable,* 395 F. Supp.2d 668, 676 (S.D. Ohio 2005).

[28] Applying this law to the present case, there is evidence that Staunch availed herself of a right under the FMLA (she took leave due to her pregnancy); she suffered adverse employment actions (she was placed on termination warning and ultimately discharged); and there was a causal relationship between her leave and the employment actions (Continental's documents repeatedly reference Staunch's absences from work during the period of her approved intermittent FMLA as the basis for disciplinary action against her). Thus, Staunch established a prima facie case of retaliation under the FMLA.

Continental asserts two reasons it contends are legitimate non-discriminatory reasons for Staunch's discharge. Those are Staunch's non-FMLA qualifying absences, and her failure to have her flight manual up to date.

Staunch may demonstrate pretext by showing the employer's reason(s) (1) have no basis in fact; (2) did not actually motivate the employer's challenged

conduct; or (3) were insufficient to warrant the challenged action. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F. 3d 1078 (6th Cir. 1994).

While Staunch admits that the reasons advanced by Continental did have a basis in fact because she did have non-FMLA absences and she voluntarily disclosed that her flight manual was not up to date, there is substantial evidence in the record that those reasons did not actually motivate the decision to place [29] Staunch on termination warning and/or were insufficient to warrant her discharge from employment.

Staunch's non-FMLA absences did not motivate the decision to place her on a termination warning because Continental had an attendance policy that provided that any absence or incident is defined as any specific period of absence from work for a single reason. (R.D. 42, DeVito Depo. p. 46, Jt. Appx. vol. III p. 596). Thus, Staunch's absence from work in May, 2003, which was all for a single reason, (R.D. 46, Staunch Affidavit at paragraph 13, Jt. Appx. vol. IV p. 664), would not have led to her being placed on a termination warning without the inclusion of her FMLA protected absences, that were also noted on the notice to Staunch placing her on termination warning. Therefore, Staunch can demonstrate that Continental's explanation that Staunch was placed on termination warning and discharged for her non-FMLA protected absences was pretextual.

Continental also contends that Staunch was terminated for not having her flight manual up to date in violation of company policy and Federal Air Regulations of the Federal Aviation Administration. (R.D. 42, De Vito Depo. p. 66, it Appx. vol. III p. 601). However, the undisputed evidence was that Staunch was the only flight attendant discharged for this violation. De Vito testified that other than the non-compliant manual, there were no performance issues other than those that related to reliability that formed the basis for Staunch's discharge. (R.D. [30] 42, De Vito Depo. P. 67, Jt. Appx. vol. III p. 601). Margo Jedlinski and Nicole Longshaw were other flight attendants found to have non-compliant flight manuals and received no discipline. (R.D. 42, De Vito Depo. pp. 99-100, Jt. Appx. vol. III p. 609). Cheryl Miller, Dawn Thibeaux, and Jennifer Orlando were flight attendants found to have non-compliant manuals and were given written warnings. (R.D. 42, De Vito Depo. p. 101-103, Jt. Appx. vol. III pp. 609-610). It is clear that had Staunch not been unfairly placed on termination warning based upon her pregnancy related absences from work, she would not have been terminated for reporting to management that she had found that her flight manual was missing a revision. Thus, the fact that she was found to be in possession of a non-compliant flight manual was insufficient to warrant her discharge, and was therefore pretextual.

Finally, even in the context of pretext, the repeated statements in Continental's records that Staunch's absences between January and April of

2002, due to her FMLA protected leave, were used against her in the disciplinary process are evidence of pretext. Where it is clear from the evidence that the Plaintiff was discharged, at least in part, because of her FMLA protected absences, summary judgment in favor of the employer is not appropriate. *Paxton,* supra.

* * *

APPENDIX E

Excerpts from Final Reply Brief of the Appellant in the Sixth Circuit Court of Appeals

IN THE SIXTH CIRCUIT COURT OF APPEALS

HOLLY L. STAUNCH	)	CASE NO. 07-3315
Staunch-Appellant	)	
	)	
-vs-	)	
CONTINENTAL AIRLINES	)	
	)	
Continental-Appellee	)	

****

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO

FINAL REPLY BRIEF OF THE APPELLANT

****

MARTIN S. HUME, ESQ. (0020422)
MARTIN S. HUME CO., L.P.A.
6 Federal Plaza Central, Suite 905
Youngstown, OH 44504
Telephone: (330) 746-8491
Attorney for Staunch-Appellant
Holly L. Staunch

JANNETTE M. LOUARD, ESQ.
LISA A. COTTLE, ESQ.
LITTLER, MENDELSON
1100 Superior Avenue
20th Floor
Cleveland, OH 44114-1886
Attorneys for Continental-Appellee
Continental Airlines, Inc.

* * *

6] I. THE RECORD CONTAINS SUFFICIENT EVIDENCE THAT STAUNCH WAS AN ELIGIBLE EMPLOYEE UNDER THE FMLA TO WITHSTAND SUMMARY JUDGMENT IN FAVOR OF CONTINENTAL.

As the court is well aware, upon deciding summary judgment, all of the evidence and all reasonable inferences from the evidence must be construed most strongly in favor of the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574; 106 S. Ct. 1348; 89 L. Ed. 2d 538 (1986). Applying this standard, it is clear that Continental was not entitled to summary judgment on the ground that Staunch did not work 1250 hours in the twelve months preceding her request for intermittent family medical leave due to her pregnancy.

To determine if an employee has the requisite 1,250 hours of service with his employer, the FMLA directs courts to examine the principles for calculating hours of service that have been established under the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 2611(2)(C), 29 C.F.R. § 825.110(c). The test for determining if an employee's time constitutes working time is whether the "time is spent predominantly for the employer's benefit or for the employee's." *Skidmore v. Swift & Co.*, 323 U.S. 134, 137, 65 S. Ct. 161, 89 L. Ed. 124 (1944); *Armour & Co. v. Wantock*, 323 U.S. 126, 133, 65 S. Ct. 165, 89 L. Ed. 118 (1944). That test requires consideration of the agreement of the parties, the nature and extent of the restrictions, the relationship between services rendered and

on-call time, and all surrounding circumstances. *Skidmore,* 323 U.S. at 137. In other words, hours [7] spent by an employee engaged in his principal work activities are considered to be hours worked under the FLSA. *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 690, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946).

In the present case, there was no dispute that Holly L. Staunch had been employed by Continental Continental [sic] Airlines, Inc., for more than twelve months. Nor was there any dispute that she was employed at a work site where there were more than fifty employees within a seventy five mile radius. (See R.D. 46, Continental's Answers to Interrogatories Nos. 16 (Continental employs 2,110 at Cleveland Hopkins Airport) Jt. Appx. vol. IV pp. 167-168, and 19 (Staunch's date of hire was April 22, 1998) Jt. Appx. vol. IV pp. 678-679). There was however, a dispute about whether Staunch worked 1250 hours.

First, it must be noted that the record affirmatively demonstrated that Continental did not keep an accurate record of Staunch's actual hours worked. Pay for flight attendants was based upon certain contractual agreements that were based upon predetermined flight hours, and was not based upon the actual time worked. (R.D. 42, DeVito Depo. p. 84, Jr. Appx. vol. III p. 605 ("Flight Attendants are compensated from "block in", when the main cabin door is closed to "block out", when the aircraft arrives and the door is reopened.) Thus, the records contained in Attachment A to Mary Sturchio's affidavit were not records of [8] the actual time worked by Staunch.

Staunch's affidavit specifically contested the accuracy of Continental's records. She stated:

> 8. Continental's submission based upon the affidavit of Mary Sturchio does not reflect the actual hours I worked for Continental. For example, the Sturchio submission listed release time as 15 minutes for each duty day worked. In fact, work was performed after each flight segment and 15 minutes was not sufficient to perform the duties required.
>
> 9. Sturchio's submission listed forty five minutes for report time for a remain overnight layover, when in fact, I had to report at least one hour before the start of each day.
>
> 10. Sturchio's affidavit does not accurately reflect the time spent in recurrent training and in preparation for recurrent training.
>
> 11. Sturchio's affidavit does not include time for required computer work, manual revisions, review of briefing books, meetings with supervisors, time for making required liquor deposits as lead flight attendant, time going through customs or travel time spent on behalf of the employer. (R.D. 46, Staunch Affidavit, Paragraphs 8-11, Jt. Appx. pp. 663-664).

If "an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked . . . the

employer has the burden of showing that the employee has not worked the requisite hours." 29 C.F.R. § 825.110(c). In such cases, the employer must be able to clearly demonstrate that the subject employee did not work the 1,250 hours during the previous twelve months in order to claim that the employee is not eligible under the FMLA. 29 C.F.R. § [9]825.110(c). *Rivero V. United Airlines, Inc,* 2005 U.S. Dist. LEXIS 297 (2005).

In this case, the employer did not meet the required burden. Staunch had personal knowledge of the hours she worked. She filed an affidavit stating she worked more than 1250 hours in the twelve months prior to her request for FMLA leave. (R.D. 30, Affidavit of Holly Staunch 9/25/06, Jt. Appx. vol. I pp. 177-181). She prepared and submitted to Continental, with her answers to interrogatories and response to Continental's Request for production of documents her calculation of hours showing she worked 2,175 hours engaged in her principal work activities for Continental Airlines in the twelve months prior to her request for FMLA. (See R.D. 46, Exhibit "J" to Staunch Affidavit of January 8, 2007, Jt. Appx. vol. IV pp. 666-668). After reviewing Continental's motion for summary judgment, Staunch learned that she had understated her flight hours and as a result she actually worked 2,323 hours and 52 minutes for Continental in the twelve months preceding her request for leave. (R.D. 46, Staunch Affidavit of January 8, 2007 Paragraph 7, Jt. Appx. vol. IV p. 663).

In her deposition, Janie DeVito, Inflight Director for Continental [sic] Continental Airlines, acknowledged that there are activities for the benefit of the employer that flight attendants are expected to perform, but are not included in the calculation of hours worked or monetary compensation paid to flight attendants. [10] Monetary compensation is determined based upon the value of the schedule awarded to the flight attendant. (R.D. 42, DeVito Depo. p. 83, Jt. Appx. vol. III p. 605). That compensation is based upon "block hours." Block hours are measured from the time the main cabin door is closed upon departure to the time it is opened upon arrival at the destination. (R.D. 42, DeVito Depo. p. 84, Jt. Appx. vol. III p. 605). For the block time, flight attendants are paid an hourly rate. (R.D. 42, DeVito Depo. p. 84, Jt. Appx. vol. III p. 605). DeVito expressly acknowledged that there are additional duties that are performed outside the period between block in and block out. (R.D. 42, DeVito Depo. p. 85, Jt. Appx. vol. III p. 605). DeVito specifically acknowledged that there are duties such as reading items placed in employee's files ((R.D. 42, DeVito Depo. p. 87, Jt. Appx. vol. III p. 606), reviewing briefing books, (R.D. 42, DeVito Depo. p. 90, Jt. Appx. vol. III p. 607), reading monthly operational newsletters, (R.D. 42, DeVito Depo. p. 91, Jt. Appx. vol. III p. 607), meeting with supervisors, (R.D. 42, DeVito Depo. p. 91, Jt. Appx. vol. III p. 607), going through customs on international flights, (R.D. 42, DeVito Depo. p. 91, Jt. Appx. vol. III p. 607), and waiting onboard a plane when it is a through flight, (R.D. 42, DeVito Depo. p.

94, Jt. Appx. vol. III p. 608), that are not covered by the block in block out times that are reflected in Continental's records of employee hours worked.

DeVito contended at her deposition that much of the reading could be done [11] by a flight attendant while in flight. She stated, "They can read it in the line of duty. That is, while I'm on the airplane being paid, I can read the material. That is an acceptable time frame for perusing that information." (R.D. 42, DeVito Depo. p. 88, Jt. Appx. vol. III p. 606).

DeVito's statement is directly contradictory to Continental' [sic] applicable policy that states that flight attendants are not to read while on duty. (See R.D. 46, Staunch Affidavit of January 8, 2007, Paragraph 12, Jt. Appx. vol. IV p. 664).

It is apparent that there is a genuine issue of material fact as to whether Staunch worked the requisite number of hours to be an eligible employee under the FMLA and thus, Continental was not entitled to summary judgment on this ground.

II. WHERE AN EMPLOYER USES FMLA QUALIFYING LEAVE AS A NEGATIVE FACTOR IN DISCIPLINARY ACTIONS AGAINST AN EMPLOYEE, THE EMPLOYER HAS INTERFERED WITH THE EMPLOYEE'S FMLA RIGHTS WITHOUT REGARD TO THE EMPLOYER'S INTENT OR MOTIVE.

Continental's response to Staunch's claim that it interfered with her FMLA rights erroneously contends

that if Staunch was allowed to take all the time off from work that she requested, she cannot state a claim for interference with her FMLA rights. (Brief of Appellee at p. 35). Continental's brief assumes that if an employee is complaining that they were terminated from employment, they must

* * *

APPENDIX F

Docket Sheet from
Sixth Circuit Court of Appeals

General Docket
United States Court of Appeals
for the Sixth Circuit

Court of Appeals Docket #: 07-3315
Nature of Suit: 3442 Civil Rights: Jobs
Staunch v. Continental Airlines
Appeal From: Northern District of Ohio at Cleveland

Docketed: 03/20/2007
Termed: 01/07/2008

Case Type Information:
1) Civil
2) Private
3) Civil Rights

Originating Court Information:
District: 0647-1 : 06-01011
Trial Judge: James S. Gwin, U.S. District Judge
Date Filed: 04/25/2006
Date Order/Judgment: 01/26/2007
Date NOA Filed: 02/08/2007

10/15/2007	Oral argument notice filed by Attorney Mr. Martin S. Hume for Appellant Holly L. Staunch.
10/15/2007	Oral argument notice filed by Attorney Ms. Janette M. Louard for Appellee Continental Airlines, Inc..
11/16/2007	ADDITIONAL CITATION filed by Mr. Martin S. Hume for Holly L. Staunch. Certificate of Service:11/14/2007.
11/29/2007	CAUSE ARGUED by Mr. Martin S. Hume for Appellant Holly L. Staunch and Ms. Janette M. Louard for

		Appellee Continental Airlines, Inc. before Judges Kennedy; Martin; Clay.
01/07/2008	■	OPINION filed : AFFIRMED; decision for publication pursuant to local rule 206. Cornelia G. Kennedy (AUTHORING), Boyce F. Martin, Jr., Eric L. Clay, Circuit Judges.
01/07/2008		JUDGMENT : AFFIRMED.
01/22/2008		PETITION for en banc rehearing filed by Mr. Martin S. Hume for Holly L. Staunch. Certificate of Service: 01/21/2008
04/11/2008	■	ORDER filed denying petition for en banc rehearing [3716484-2] filed by Mr. Martin S. Hume for Holly L. Staunch. Cornelia G. Kennedy, Boyce F. Martin, Jr., Eric L. Clay, Circuit Judges.
04/24/2008	■	MANDATE ISSUED with no costs taxed.
07/17/2008		U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Holly L. Staunch. Supreme Court Filed Date: 07/09/2008, Supreme Court Case Number: 08-53.